

hired at a fixed salary of \$275 for 55 hours of work, he was entitled to a statutory overtime premium for the 15 hours in excess of 40 at the rate of \$2.50 per hour (half-time) in addition to his salary, and to statutory overtime pay of \$7.50 per hour (time and one-half) for any hours worked in excess of 55. If the scheduled workweek is later reduced to 50 hours, with the understanding between the parties that the salary will be paid as the employee's nonovertime compensation for each workweek of 55 hours or less, his regular rate in any overtime week of 55 hours or less is determined by dividing the salary by the number of hours worked to earn it in that particular week, and additional half-time, based on that rate, is due for each hour in excess of 40. In weeks of 55 hours or more, his regular rate remains \$5 per hour and he is due, in addition to his salary, extra compensation of \$2.50 for each hour over 40 but not over 55 and full time and one-half, or \$7.50, for each hour worked in excess of 55. If, however, the understanding of the parties is that the salary now covers a fixed workweek of 50 hours, his regular rate is \$5.50 per hour in all weeks. This assumes that when an employee works less than 50 hours in a particular week, deductions are made at a rate of \$5.50 per hour for the hours not worked.

[46 FR 7316, Jan. 23, 1981]

§ 778.326 Reduction of regular overtime workweek without reduction of take-home pay.

The reasoning applied in the foregoing sections does not, of course, apply to a situation in which the former earnings at both straight time and overtime are paid to the employee for the reduced workweek. Suppose an employee was hired at an hourly rate of \$5 an hour and regularly worked 50 hours, earning \$275 as his total straight time and overtime compensation, and the parties now agree to reduce the workweek to 45 hours without any reduction in take-home pay. The parties in such a situation may agree to an increase in the hourly rate from \$5 per hour to \$6 so that for a workweek of 45 hours (the reduced schedule) the employee's straight time and overtime earnings will be \$285. The parties cannot, however, agree that the employee

is to receive exactly \$285 as total compensation (including overtime pay) for a workweek varying, for example, up to 50 hours, unless he does so pursuant to contracts specifically permitted in section 7(f) of the Act, as discussed in §§ 778.402 through 778.414. An employer cannot otherwise discharge his statutory obligation to pay overtime compensation to an employee who does not work the same fixed hours each week by paying a fixed amount purporting to cover both straight time and overtime compensation for an "agreed" number of hours. To permit such a practice without proper statutory safeguards would result in sanctioning the circumvention of the provisions of the Act which require that an employee who works more than 40 hours in any workweek be compensated, in accordance with express congressional intent, at a rate not less than one and one-half times his regular rate of pay for the burden of working long hours. In arrangements of this type, no additional financial pressure would fall upon the employer and no additional compensation would be due to the employee under such a plan until the workweek exceeded 50 hours.

[46 FR 7316, Jan. 23, 1981]

§ 778.327 Temporary or sporadic reduction in schedule.

(a) The problem of reduction in the workweek is somewhat different where a temporary reduction is involved. Reductions for the period of a dead or slow season follow the rules announced above. However, reduction on a more temporary or sporadic basis presents a different problem. It is obvious that as a matter of simple arithmetic an employer might adopt a series of different rates for the same work, varying inversely with the number of overtime hours worked in such a way that the employee would earn no more than his straight time rate no matter how many hours he worked. If he set the rate at \$6 per hour for all workweeks in which the employee worked 40 hours or less, approximately \$5.93 per hour for workweeks of 41 hours, approximately \$5.86 for workweeks of 42 hours, approximately \$5.45 for workweeks of 50 hours, and so on, the employee would always receive (for straight time and overtime

at these "rates") \$6 an hour regardless of the number of overtime hours worked. This is an obvious book-keeping device designed to avoid the payment of overtime compensation and is not in accord with the law. See *Walling v. Green Head Bit & Supply Co.*, 138 F. 2d 453. The regular rate of pay of this employee for overtime purposes is, obviously, the rate he earns in the normal nonovertime week—in this case, \$6 per hour.

(b) The situation is different in degree but not in principle where employees who have been at a bona fide \$6 rate usually working 50 hours and taking home \$330 as total straight time and overtime pay for the week are, during occasional weeks, cut back to 42 hours. If the employer raises their rate to \$7.65 for such weeks so that their total compensation is \$328.95 for a 42-hour week the question may properly be asked, when they return to the 50-hour week, whether the \$6 rate is really their regular rate. Are they putting in 8 additional hours of work for that extra \$1.05 or is their "regular" rate really now \$7.65 an hour since this is what they earn in the short workweek? It seems clear that where different rates are paid from week to week for the same work and where the difference is justified by no factor other than the number of hours worked by the individual employee—the longer he works the lower the rate—the device is evasive and the rate actually paid in the shorter or nonovertime week is his regular rate for overtime purposes in all weeks.

[46 FR 7317, Jan. 23, 1981; 46 FR 33516, June 30, 1981]

§ 778.328 Plan for gradual permanent reduction in schedule.

In some cases, pursuant to a definite plan for the permanent reduction of the normal scheduled workweek from say, 48 hours to 40 hours, an agreement is entered into with a view to lessening the shock caused by the expected reduction in take-home wages. The agreement may provide for a rising scale of rates as the workweek is gradually reduced. The varying rates established by such agreement will be recognized as bona fide in the weeks in which they are respectively operative

provided that (a) the plan is bona fide and there is no effort made to evade the overtime requirements of the Act; (b) there is a clear downward trend in the duration of the workweek throughout the period of the plan even though fluctuations from week-to-week may not be constantly downward; and (c) the various rates are operative for substantial periods under the plan and do not vary from week-to-week in accordance with the number of hours which any particular employee or group happens to work.

§ 778.329 Alternating workweeks of different fixed lengths.

In some cases an employee is hired on a salary basis with the understanding that his weekly salary is intended to cover the fixed schedule of hours (and no more) and that this fixed schedule provides for alternating workweeks of different fixed lengths. For example, many offices operate with half staff on Saturdays and, in consequence, employees are hired at a fixed salary covering a fixed working schedule of 7 hours a day Monday through Friday and 5 hours on alternate Saturdays. The parties agree that extra compensation is to be paid for all hours worked in excess of the schedule in either week at the base rate for hours between 35 and 40 in the short week and at time and one-half such rate for hours in excess of 40 in all weeks. Such an arrangement results in the employee's working at two different rates of pay—one thirty-fifth of the salary in short workweeks and one-fourtieth of the salary in the longer weeks. If the provisions of such a contract are followed, if the nonovertime hours are compensated in full at the applicable regular rate in each week and overtime compensation is properly computed for hours in excess of 40 at time and one-half the rate applicable in the particular workweek, the overtime requirements of the Fair Labor Standards Act will be met. While this situation bears some resemblance to the one discussed in § 778.327 there is this significant difference; the arrangement is permanent, the length of the respective workweeks and the rates for such weeks are fixed on a permanent-schedule basis far in advance and are